

(2)
No. 88-245

Supreme Court, U.S.

FILED

OCT 7 1988

WILLIAM SPANOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE CLARIDGE HOTEL & CASINO, PETITIONER

v.

ANN McLAUGHLIN, SECRETARY OF LABOR

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

CHARLES I. HADDEN
Deputy Associate Solicitor

EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

1502

QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioner failed to pay certain casino supervisors "on a salary basis" as required to meet the "executive employee" exemption from the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. 213(a)(1).



TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	11

TABLE OF AUTHORITIES

Cases:

<i>Arnold v. Ben Kanowsky, Inc.</i> , 361 U.S. 388 (1960)	7
<i>Brock v. Louvers & Dampers, Inc.</i> , 817 F.2d 1255 (6th Cir. 1987)	7
<i>Donovan v. Williams Chemical Co.</i> , 682 F.2d 185 (8th Cir. 1982)	7
<i>McReynolds v. Pocahontas Corp.</i> , 192 F.2d 301 (1951)	9
<i>Paul v. Petroleum Equip. Tools Co.</i> , 708 F.2d 168 (5th Cir. 1983)	7
<i>Secretary of Labor v. Daylight Dairy Prods., Inc.</i> , 779 F.2d 784 (1st Cir. 1985)	10

Statutes and regulations:

Fair Labor Standards Act, 29 U.S.C. (& Supp. III) 201 <i>et seq.</i> :	
§ 7(a) (1), 29 U.S.C. 207(a) (1)	2
§ 13(a) (1), 29 U.S.C. 213(a) (1)	2, 5, 7
29 C.F.R.:	
Section 541.1(f)	2, 3, 7
Section 541.118(a)	2, 3, 7
Section 541.118(a) (1)	2, 7, 8
Section 541.118(a) (2)	2, 7, 8

IV

Statutes and regulations—Continued:

Page

Section 541.118 (a) (3)	2
Section 541.118 (a) (4)	2
Section 541.118 (a) (6)	3, 8
Section 541.118 (b)	3

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-245

THE CLARIDGE HOTEL & CASINO, PETITIONER

v.

ANN McLAUGHLIN, SECRETARY OF LABOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A29) is reported at 846 F.2d 180. The district court's September 19, 1986 opinion (Pet. App. A31-A44) and May 8, 1987 supplemental opinion (Pet. App. A45-A54) are reported at 664 F. Supp. 899.

JURISDICTION

The judgment of the court of appeals was filed on May 2, 1988. A petition for rehearing was denied on June 1, 1988 (Pet. App. A30). The petition for a writ of certiorari was filed on August 9, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7(a)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 207(a)(1), forbids an employer from employing any worker "for a workweek longer than forty hours unless such employee receives compensation * * * at a rate not less than one and one-half times the [worker's] regular rate" for the excess hours. There is an exemption from Section 7(a)(1), however, for "any employee employed in a bona fide executive, administrative, or professional capacity * * * as such terms are defined and delimited from time to time by regulations of the Secretary * * *" (29 U.S.C. 213(a)(1)). Acting through the Wage and Hour Administrator of the Department of Labor, the Secretary has promulgated regulations defining the "executive employee" exemption, including a requirement that any such "executive" must be compensated "on a salary basis at a rate of not less than \$250 per week" (29 C.F.R. 541.1(f)).

The regulations also define "salary basis" in some detail. To satisfy that definition, an employee must receive "a predetermined amount constituting all or part of his compensation * * * for any week in which he performs any work without regard to the number of days or hours worked" (29 C.F.R. 541.118(a)). Deductions may not be made "for absences occasioned by the employer or by the operating requirements of the business," such as "when work is not available" (*id.* § 541.118(a)(1)). Deductions for activities such as jury duty or military leave are also not allowed (*id.* § 541.118(a)(4)). Deductions are allowed for absences "for a day or more" either for personal reasons or due to sickness or disability if the deduction follows a bona fide sickness and disability plan (*id.* § 541.118(a)(2) and (3)). Improper deductions do

not, without more, require a finding of nonsalary status; rather, that determination "depend[s] upon the facts in the particular case" (*id.* § 541.118(a)(6)).

The regulations permit "additional compensation besides the salary" (29 C.F.R. 541.118(b)), and three examples of such extra compensation are set out. The first two are commissions based on sales and bonuses based on profits. The third example is "an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations [29 C.F.R. 541.1(f)]" (29 C.F.R. 541.118(b)). The minimum salary, however, may not be made subject to improper deductions, nor may it be divided, with one part being made subject to improper deductions (*ibid.*).

2. Petitioner is a limited partnership that operates a hotel and gambling casino in Atlantic City, New Jersey. In the casino, petitioner employs dealers, who actually operate the games, and several levels of supervisors. A boxperson observes the operation of a single craps table, at which three dealers work; a floorperson observes several gaming tables; and a pit boss supervises the dealers, boxpersons, and floorpersons in a specified area of the casino. All of the supervisors are required to report to their stations fifteen minutes before the start of their shifts, and they must sign in upon arrival and departure. In the event that the casino is overstaffed at any given time, employees are entitled to leave early, pursuant to the company's "early out" procedure. Those who choose to remain are assigned to other tasks. Pet. App. A3-A4.

Each pit boss, floorperson, and boxperson executed a written employment contract containing a "Weekly

Salary Guarantee.” That guarantee stated that the employee would be “guaranteed a weekly salary of \$250.00 for any week in which [he] performs any service.” It provided, however, that the guarantee would not apply whenever an employee missed work because of illness, disability, or personal reasons, or because of participation in petitioner’s “early out” program. The supervisors were paid for all of their work at the same hourly rate, although they regularly worked more than 40 hours in a week. Pet. App. A4-A5.

3. In 1984, the Secretary brought an action to enjoin petitioner from violating the FLSA overtime provisions. Although the parties agreed that petitioner’s supervisors met most of the requirements of the “executive employee” exemption, the Secretary contended that the employees were not “compensated on a salary basis” and were accordingly entitled to be paid at the time-and-one-half overtime rate prescribed by the statute. The district court entered judgment in the Secretary’s favor (Pet. App. A31-A44). The court found that, despite petitioner’s designation, the supervisors’ pay was “nothing more than an hourly wage” and that the \$250 guarantee was “nothing more than an illusion” (*id.* at A41). Far from the normal mode of payment, the court observed, the \$250 guarantee, “[b]y design, * * * comes into play only in the rare instance where an employee is not scheduled for a sufficient number of shifts, or is not permitted by the [petitioner] to work a sufficient number of hours, to earn \$250.00” (*id.* at A35). The court determined that, with the exception of 12 instances, the supervisors were paid strictly for the hours that they worked, at straight time (*id.* at A41). The court also found that peti-

tioner had "made a number of improper deduction from the guaranteed salary" and that it "did not have a mechanism to ensure that the guarantee was provided to those eligible supervisory employees" (*id.* at A43). It accordingly concluded that "the Weekly Salary Guarantee was merely a way to attempt compliance with the FLSA while circumventing the 'time and one-half' overtime provisions" (*ibid.*). Upholding the Secretary's claim, the district court therefore rejected petitioner's contention that the supervisory employees were "executives" within the meaning of 29 U.S.C. 213(a)(1).¹

4. The court of appeals affirmed the district court's ruling that petitioner had violated the overtime provision because its compensation scheme did not constitute payment on a "salary basis" (Pet. App. A1-A29).² The court upheld the district court's finding that the supervisors' wages were "actually calculated on an hourly basis" (*id.* at A9), and it concluded that, under the circumstances presented, this "otherwise hourly wage [could not] be transformed into payment on a salary basis within the meaning of the regulations by virtue of the guaranteed minimum weekly payment" (*id.* at A10). The court reasoned that, as a practical matter, the guarantee bore "no relation" to the method by which the employee

¹ The district court also held that petitioner's violations of the FLSA were not willful and that a two-year, rather than three-year statute of limitations was therefore applicable. It also declined to assess liquidated damages against petitioner. Pet. App. A43-A44.

² The court of appeals remanded the case to the district court for further findings with respect to the questions of liquidated damages and the statute of limitations (Pet. App. A15-A20). The petition does not present those questions.

were actually paid. Rather, the court explained, "the guarantee at issue here was met generally because the supervisors [were] well-paid" (*id.* at A11), and it stated that "a minimum payment unrelated to an employee's income" cannot, in "common understanding," be considered that employee's "salary" (*ibid.*). The court acknowledged that the Secretary's regulations permit a salary to be supplemented by a non-salary component, but it rejected petitioner's effort to describe its Weekly Salary Guarantee in those terms (*id.* at A11-A12). It also found that petitioner had made impermissible deductions for absences arising from the "early out" program (*id.* at A13). While the court recognized that the Wage and Hour Administrator had issued certain rulings permitting guarantees similar to petitioner's to operate as salaries, it concluded that those rulings were "too infrequent to bind the Secretary" and that petitioner had not relied on any of them (*id.* at A13-A14). The court also held that the Secretary's determination in this case constituted an "interpret[ation of] the existing regulation," rather than, as petitioner contended, improper agency rulemaking (*id.* at A14).³

³ Judge Stapleton concurred in the court's decision to remand for further proceedings (Pet. App. A21-A29), but he was of the view that petitioner's Weekly Salary Guarantee could well satisfy the applicable regulations. He would therefore have remanded the case for a determination whether petitioner's failure to make the guaranteed payment in several instances reflected an intention not to pay employees "on a salary basis" (*id.* at A27-A29).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is unwarranted.

1. Section 13(a)(1) of the FLSA, 29 U.S.C. 213 (a)(1), authorizes the Secretary to promulgate regulations that "define[] and delimit[]" which employees shall be exempt from the Act's overtime provisions on the grounds that they are "employed in a bona fide executive * * * capacity." Pursuant to that authority, the Secretary has promulgated regulations stating that an executive employee must be paid "on a salary basis" (29 C.F.R. 541.1(f)). That requires, among other things, that the employee be paid "a predetermined amount" received "for any week in which he performs any work without regard to the number of days or hours worked" (29 C.F.R. 541.118(a)) and that no deductions be taken from his salary "for absences occasioned by the employer or by the operating requirements of the business," such as "when work is not available" (*id.* § 541.118(a)(1)), or for absences of less than a day taken for personal reasons (*id.* § 541.118(a)(2)). An employer "bears the burden of proving exempt status" under the Act, and all exemptions "are to be narrowly construed against the employer." *Paul v. Petroleum Equip. Tools Co.*, 708 F.2d 168, 170 (5th Cir. 1983). Accord *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Brock v. Louvers & Dampers, Inc.*, 817 F.2d 1255, 1256 (6th Cir. 1987); *Donovan v. Williams Chemical Co.*, 682 F.2d 185, 191 (8th Cir. 1982).

In the present case, the court of appeals faithfully applied those principles and concluded that the boxpersons, floorpersons, and pit bosses at petitioner's

casino were not "executive employees." The courts below concluded (Pet. App. A11, A41) that, far from receiving any "predetermined amount" of pay, petitioner's employees received more than \$250 a week only because their hourly wage, multiplied by the number of hours worked, exceeded the "guarantee."⁴ In addition, the courts below found that petitioner had made impermissible deductions from the employees' pay. Among other things, the courts determined (*id.* at A13, A42-A43) that petitioner's deductions for partial-day absences arising from its "early out" program violated 29 C.F.R. 541.118(a)(1) and (2). Those fact-bound conclusions warrant no further review.

Petitioner contends, however, that the Secretary has made "substantive changes in [the] administrative regulations" (Pet. 8) without proceeding through formal rulemaking. In particular, petitioner asserts that, under existing regulations, the employer had been permitted to pay an employee on an hourly basis, as long as the employee ultimately received a guaranteed weekly amount consistent with the regulations (Pet. 13). First, the Secretary did not *depart* from existing regulations because, as the court of appeals concluded (Pet. App. A12), the regulations do not by their terms either preclude or permit a guarantee to be based on hourly wages. Thus, the Secre-

⁴ Moreover, in all of the instances in which petitioner has admitted that it should have applied the guarantee—approximately 12 in all—it failed to make the guaranteed payment until the Secretary commenced this investigation. See Pet. App. A5 & n.2, A41 & n.4. That consistent failure to pay the guarantee confirms, under 29 C.F.R. 541.118(a)(6), that petitioner had "no intention to pay the employee on a salary basis."

tary simply *interpreted* the regulations, rather than changing them for purposes of this litigation.⁵ Second, and in any event, as the courts below concluded, petitioner did not pay its employees a guaranteed salary, however calculated. Instead, it generally paid at least the guaranteed minimum, but only because its employees worked a sufficient number of hours at a large enough hourly rate; and in the only cases in which the guarantee served any purpose, petitioner failed to pay it.⁶ In addition, petitioner made unauthorized deductions from the pay, confirming that there was no guarantee at all.

⁵ Petitioner erroneously relies (Pet. 9-15) on the history of the "salary basis" regulation in concluding that hourly payment is consistent with the salary basis. The predecessors to the current regulations do not support that view. See, *e.g.*, Pet. App. A87 (1940 Stein Report) (the salary basis requirement "is not fulfilled by the earnings of a person who is paid on an hourly basis"); Pet. App. A93 (1949 Weiss Report) (rejecting a proposal to eliminate the salary basis requirement and instead "to apply an hourly rate * * * test"). Petitioner also objects (Pet. 15) to the Secretary's withdrawal of two opinion letters that approved pay plans similar to its own. The court of appeals correctly concluded that the Secretary's withdrawal has no bearing on the case (Pet. App. A14 & n.7), because petitioner made no showing that it had relied upon those opinion letters.

⁶ See note 4, *supra*. For that reason, the court of appeals' decision is not in conflict with the decision of the Fourth Circuit in *McReynolds v. Pocahontas Corp.*, 192 F.2d 301 (1951). In the *McReynolds* case, the court of appeals held that employees who had been guaranteed three shifts per week were paid on a "salary basis" and were therefore employed "in a bona fide executive" capacity (*id.* at 302 (citation omitted)). The court explained that "a 'salary basis' is a guaranteed wage whether the Company operates or not," and it stated that "[a]ny formula which results in such a guarantee is suffi-

2. Petitioner contends (Pet. 23-25) that the court of appeals violated separation of powers principles by “adopting its own, novel definition” of the phrase “executive capacity” (Pet. 25). According to petitioner, the court of appeals “opined” that an employee cannot be employed on a salary basis unless he has the “freedom to determine [his] hours of work”—a standard that cannot be met “if payment depend[s] on the number of hours worked” (*ibid.*). To be sure, the court of appeals noted that employees paid by the hour ordinarily lack one of the attributes of executive status—the right to determine how much time a particular task requires. But the court explicitly refused to “adopt” that standard as a prerequisite to a finding of executive status under the regulations. See Pet. App. A10 n.4. Petitioner’s “separation of powers” contention is thus not presented in the case.

cient” (*id.* at 303). In the present case, by contrast, petitioner’s employees did not receive an actual guarantee at all. Rather, they received income on an hourly basis that by happenstance usually, but not always, exceeded the guaranteed minimum. Accord *Secretary of Labor v. Daylight Prods., Inc.*, 779 F.2d 784, 787 (1st Cir. 1985) (unlike the employees in *McReynolds*, the defendant’s employees “did not have a guaranteed income” but instead “were paid only for the hours they actually worked, and some in fact did not exceed the * * * “minimum”).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

CHARLES I. HADDEN
Deputy Associate Solicitor

EDWARD D. SIEGER
Attorney

OCTOBER 1988